IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 27-04-2007

CORAM

THE HONOURABLE MRS.JUSTICE PRABHA SRIDEVAN

SECOND APPEAL No.895 OF 1995

Thirumalaisamy ... Appellant/Defendant

-vs-

1.Kuppusamy
2.Muthusamy Gounder
3.Nachiappan
4.Raju
5.Mariammal (died)
6.Muthulakshmi
7.Kalpana (minor),
rep.by mother and natural
guardian Muthulakshmi
6th respondent.
8.Selvam ... Respondents/Plaintiffs 1 to 3 & 5 to 8

R8 brought on record as LR
of the deceased 5th respondent vide
order dated 16.04.2007 made in
CMP.Nos.3857 to 3859/06

Appeal against the judgment and decree, dated 13.12.1994, made in A.S.No.61 of 1994 on the file of Sub-Court, Udumalpet, as against the judgment and decree, dated 18.04.1994, made in O.S.No.522 of 1991 on the file of District Munsif Court, Pollachi.

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For appellant : Mr.S.Kadarkarai
For respondents : Mr.V.Nicholas

J U D G M E N T

Defendant is the appellant.

2. Suit was filed for declaration and recovery of possession. It was dismissed, but, on appeal, reversed.

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3. The following substantial questions of law were framed, when the Second Appeal was admitted :

(1) Whether the suit filed by the plaintiffs on the basis of settlement deed under Ex.A-1 is not barred by res judicata especially when the suit filed by Kandasamy Gounder on the strength of the same settlement deed was dismissed as early as on 24.10.1986 ?

(2) Whether the finding of the lower appellate Court is sustainable in law in relation to Ex.A-1 and whether the gift is valid and acted upon in the absence of acceptance by the donee ?

(3) Whether the lower appellate court has not misdirected itself in ignoring the appellant's case for adverse possession?

(4) Even granting that Ex.A-1 is genuine, whether the decree of the lower appellate court is sustainable in law ignoring the possession and enjoyment of the appellant even beyond the statutory period prior to Ex.A-1?

4. Respondents filed the suit, on the ground that Sellammal, original owner of the property, had settled the property on them by way of registered settlement deed, Ex.A-1. They had earlier filed another suit for bare injunction in O.S.No.382 of 1984 and it was dismissed, for default. Thereafter, the suit for declaration and recovery of possession was filed.

5. Learned counsel for the appellant rested his case on two grounds, viz., (i) Settlement Deed, Ex.A-1, was not acted upon and possession was not given to the respondents and (ii) appellant had perfected title by adverse possession for thirty years. It is also his case, that prior to the suit, it was the appellant, who had been in possession, and the settlor of Ex.A-1 had no cause to exclude her brother's son, namely, the appellant, especially, when it was he who lived with the settlor Sellammal, during her lifetime. The learned counsel relied on the following decisions :

(i) 1997 (2) L.W.453 (Baby Ammal Vs. Rajan Asari) ;
(ii) 2001 (3) L.W.704 (Manavalan Vs. Chennammal & Others) and
(iii) 2005 (2) L.W.470 (N.S.Spance Vs. D.S.Kanagarajan)

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6. Learned counsel for the respondents submitted that the objection regarding the non-acceptance of the settlement deed was never pleaded and it is not open to the appellant now to raise the issue and, further, even though the appellant had averred in the written statement that he has been in possession and enjoyment of the suit property for the last thirty years, there is no pleading that he had the intention to hold the property adverse to the title of the true owner and, therefore, however long and continuous possession he had, it may not have ripen into adverse possession, in the absence of pleading regarding animus to hold adverse to the real owner and also the specific date from which the appellant acted hostile to the true owner. The learned counsel relied on the following judgments :

(i)AIR 1975 MADRAS 167 (The Commissioner, Hindu Religious and Charitable Endowments, Madras. Vs. V.Krishnaswami and another) ;

(ii)1980 MLJ 232 (Kasi Ammal Vs. Vellai Gounder and another) ;

(iii)1997 (I) CTC 256 (J.Kuppuswami Mudali and others Vs. Mahalingam) and

(iv)1998 (III) MLJ 267 (Govindammal and others Vs.Ammasi Kounder)

7. The Written Statement, in this regard, will settle the whole issue, the relevant portion of which statement reads as follows :

> " 4. It is admitted that the suit properties originally belonged to one Sellammal. But it is an utter-falsehood to allege that the said Sellammal executed a registered settlement deed dated 16.7.1981 in favour of Kandasamy gounder. No such settlement deed was executed by Sellammal and the alleged settlement deed is nothing but a forged document. Possession was also not handed over to the said Kandasamy gounder as per the alleged settlement deed. Kandasamy gounder was never in the possession and enjoyment of the suit property as per the so called settlement deed.
>
> 5. It is submitted that only this defendant is in the possession and enjoyment of the suit property for the last 30 years. Even during the life time of late Sellammal only this defendant was in the possession and enjoyment of the suit property. Sellammal did not have any issues and only she was bringing up this defendant as her own son from the child-hood of the defendant. Sellammal never intended to give the property to late

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Kandasamy gounder to the exclusion of this defendant. Only with a view to grab the properties illegally late Kandasamy gounder has created such a settlement deed by making forgery.

6. It is submitted that the plaintiffs have suppressed the fact that late Kandasamy gounder already filed a suit in O.S.No.382/84 on the file of this Hon'ble Court basing upon this title upon the very same settlement deed dated 16.7.1981 said to have been executed by Sellammal. The suit was filed praying for the permanent injunction in favour of the said Kandasamy gounder restraining the present defendant from interfering with the alleged peaceful possession and enjoyment of Kandasamy gounder in the suit property.....

7. The suit was dismissed on 24.10.1986, for default. Hence, it is not open to the plaintiffs to come forward with a fresh suit for the same property on the strength of the same settlement deed. The suit is to be dismissed in limine on this ground alone. The suit is hit by the principles of res-judicata.

8. The suit is not maintainable because the plaintiffs and their father were never in the possession and enjoyment of the suit property within the statutory period or at any point of time. Hence, also the suit is not maintainable and is to be dismissed. The allegation that this defendant trespassed into the suit property on 8.1.1989, is an utter-falsehood and as submitted above he is in the continuous possession and enjoyment of the suit property for 30 years. There is no cause of action for the suit and the alleged cause of action is false."

8. P.Ws.2 and 3, attestors to Ex.A-1, were examined and, through them, the genuineness of Ex.A-1 has been proved. The lower appellate Court came to the conclusion that Ex.A-1 is a genuine document.

9. In Govindammal and others Vs. Ammasi Kounder, 1998 (III) M.L.J. 267, it was held that Section 123 of the Transfer of Property Act does not contemplate handing over of possession of properties when property gifted is immovable property. To the same effect is the case of J.Kuppuswami Mudali and others Vs. Mahalingam, 1997 (I) CTC 256.

10. On the side of appellant, the case of Baby Ammal v. Rajan Asari, 1997 (2) L.W.453 has been cited. That was a case where the settlor himself claimed that possession was not handed over, which will not apply

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to the present case. In Manavalan Vs. Chennammal & Others, 2001 (3) L.W.704, also, which has been relied on by the appellant, D.W.1, who was the settlor, had continued in possession. As regards adverse possession, learned counsel for the appellant relied on N.S.Spance Vs. D.S.Kanagarajan, 2005 (2) L.W.470, wherein it was held as follows :

> "Possession based upon trespass is an offence at its origin. But, that possession, if not disturbed and is allowed to continue well over the statutory period viz., more than 12 years, it confers right to such property upon the person, who had committed trespass."

11. As regards the question of res judicata, learned counsel for the respondents relied on The Commissioner, Hindu Religious and Charitable Endowments, Madras. Vs. V.Krishnaswami and another, AIR 1975 MADRAS 167.

12. The earlier suit was one for injunction and it was dismissed for default. In that suit, the cause of action was the alleged trespass by the appellant. Here, the cause of action for the suit is different and the respondents prayed for recovery of possession.

13. In 2000 (7) Supreme Court Cases 543 (Gram Panchayat of Village Naulakha v. Ujagar Singh & Ors.), the Supreme Court held as follows :

> "10. We may also add one other important reason which frequently arises under Section 11 CPC. The earlier suit by the respondent against the Panchayat was only a suit for injunction and not one on title. No question of title was gone into nor decided. The said decision cannot, therefore, be binding on the question of title. See in this connection Sajjadanashin Sayed v. Musa Dadabhai Ummer (2000 (3) SCC 350) where this Court, on a detailed consideration of law in India and elsewhere held that even if, in an earlier suit for injunction, there is an incidental finding on title, the same will not be binding in a latter suit or proceeding where title is directly in question, unless it is established that it was 'necessary' in the earlier suit to decide the question of title for granting or refusing injunction and that the relief for injunction was founded or based on the finding on title. Even the more framing of an issue on title may not be sufficient as pointed out in that case."

14. Exs.A-21 to A-23 would show that no finding was given on title in the earlier suit. The appellate Court rightly held that the earlier suit will not operate as res judicata. The appellate Court had also held that Ex.A-1 was proved in accordance with law and, therefore, it

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was not necessary that possession should have been handed over. The settlement deed came into effect contemporaneously. Moreover, during the lifetime of the settlor, no steps have been taken for revocation of the settlement deed. The only way in which the appellant could have resisted the relief for recovery of possession is by pleading and proving adverse possession. The pleadings in the written statement have been extracted, wherein, at no point of time, the appellant had pleaded that he had animus to hold the property, adverse to the right of the true owner.

15. It is well settled that long and continuous possession, without the required animus, will not give a person the right to resist the claim of the true owner. No substantial questions of law arise for consideration in this appeal. Therefore, this Second Appeal is dismissed. No costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1.The Sub-Court,
Udumalpet.

2.The District Munsif,
Pollachi.

3. The Section Officer,
V.R.Section,
High Court, Madras

1 cc To Mr.S.Kadarkarai, Advocate, SR.29656.

S.A.No.895 OF 1995

GG(CO)
RVL 27.06.2007

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